

<input type="checkbox"/> FILED	<input type="checkbox"/> RECEIVED
<input type="checkbox"/> ENTERED	<input type="checkbox"/> SERVED ON
COUNSEL/PARTIES OF RECORD	
OCT - 5 2011	
CLERK US DISTRICT COURT	
DISTRICT OF NEVADA	
BY:	DEPUTY

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

TYRONE B. HUTCHINS,

Plaintiff,

vs.

NEVADA DEPARTMENT OF  
CORRECTIONS, et. al.

Defendants.

3:10-cv-00369-LRH (WGC)

**REPORT AND RECOMMENDATION  
OF U.S. MAGISTRATE JUDGE**

This Report and Recommendation is made to the Honorable Larry R. Hicks, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR IB 1-4. Before the court is Plaintiff's Motion for Leave to File Second Amended Complaint. (Doc. # 36.)<sup>1</sup> Defendants opposed (Doc. # 38) and Plaintiff replied (Doc. # 40). Also before the court is Plaintiff's Motion to Stay Summary Judgment Proceedings. (Doc. # 39.)

**I. BACKGROUND**

At all relevant times, Plaintiff Tyrone Hutchins (Plaintiff) was in custody of the Nevada Department of Corrections (NDOC). (Pl.'s Compl. (Doc. # 6).) Plaintiff is currently incarcerated at Southern Desert Correctional Center (SDCC); however, Plaintiff's allegations also pertain to events taking place when he was housed at Ely State Prison (ESP), Northern Nevada Correctional Center (NNCC), High Desert State Prison (HDSP), and Nevada State Prison (NSP). Plaintiff, a *pro se* litigant, brings this action pursuant to 42 U.S.C. § 1983. (*Id.*)

---

<sup>1</sup> Refers to the court's docket number.

1 Plaintiff's original Complaint was filed on September 15, 2010. (Doc. # 6.) Plaintiff asserts  
2 that while in NDOC custody, he has suffered heart attacks and related heart and blood pressure  
3 problems and has twice been emergency transported from ESP for medical care. (*Id.*) He claims  
4 that Defendants transferred him to a prison more than fifty miles from a major hospital in  
5 contravention of physicians' orders, with knowledge of his heart condition. (*Id.*) He asserts that  
6 Defendants knew of the physicians' orders and acted with deliberate indifference to his serious  
7 medical needs, in violation of his Eighth Amendment rights. (*Id.*) After screening, the Complaint  
8 was allowed to proceed against Defendants Howard Skolnik, James Baca, E.K. McDaniel, Debra  
9 Brooks, Pete Gibson, Debra Noel (wrongly named as Noal), and Jim Benedetti. (See Doc. # 5.)

10 On October 8, 2010, Plaintiff filed a Motion for Leave to File Amended Complaint. (Doc.  
11 # 9.) On January 4, 2011, the court granted Plaintiff leave to file his Amended Complaint. (Doc.  
12 # 15 and Doc. # 16.) On screening, the court found the Amended Complaint was incomplete  
13 because it only indicated Plaintiff sought to add parties. (See Doc. # 17.) The Amended  
14 Complaint was dismissed with leave to file a second amended complaint within thirty days. (*Id.*)  
15 The court advised Plaintiff that any second amended complaint should specifically identify each  
16 defendant, clarify what constitutional right he believes each defendant has violated and support  
17 each claim with factual allegations about each defendant's actions. (Doc. # 17.) Plaintiff was  
18 advised if he failed to file a second amended complaint, the action would proceed on the original  
19 Complaint. (*Id.*)

20 Plaintiff failed to file a second amended complaint within thirty days. On February 28,  
21 2011, the court ordered the action would proceed on the original Complaint. (See Doc. # 18  
22 (referring to the original Complaint at Doc. # 6).) Defendants answered on March 2, 2011. (Doc.  
23 # 19.) On the same date, the court entered its Scheduling Order (Doc. # 20) requiring that any  
24 motion for leave to amend be served within sixty (60) days, unless an exception was granted  
25 for good cause shown. (*Id.*)

26 On June 7, 2011, Defendants filed their Motion for Summary Judgment. (Doc. # 23.)  
27  
28

1 On June 20, 2011, Plaintiff filed a Motion to Compel. (Doc. # 27 and Doc. # 28 (Errata).) On  
 2 July 1, 2011, the court stayed the summary judgment proceedings pending the court's decision  
 3 on the Motion to Compel. (See Doc. # 30 and Doc. # 33.) The Motion to Compel was heard  
 4 on July 20, 2011, and was denied with the exception of Defendant Skolnik's response to  
 5 Plaintiff's Request for Admission No. 1, and Plaintiff's First Request for Production of  
 6 Documents. (See Doc. # 34.) In addition, Plaintiff was given five (5) hours to review his medical  
 7 records and tag the documents he wanted copied, and the medical department was ordered to  
 8 keep those copies for Plaintiff's use at a later time. (*Id.*) Finally, Plaintiff was given forty-five  
 9 (45) days, up to September 3, 2011, to oppose Defendants' Motion for Summary Judgment. (*Id.*)

10 As of September 3, 2011, Plaintiff had not filed an opposition. Instead, he filed the instant  
 11 Motion for Leave to File Second Amended Complaint (Doc. # 36) on September 6, 2011, which  
 12 Defendants oppose (Doc. # 38). Plaintiff subsequently filed a Motion to Stay Summary  
 13 Judgment Proceedings while his motion for leave to amend is pending. (Doc. # 39.)

## 14 II. DISCUSSION

15 Under Federal Rule of Civil Procedure 15(a)(2), "a party may amend its pleading only  
 16 with the opposing party's written consent or the court's leave. The court should freely give leave  
 17 when justice so requires." Fed.R.Civ.P. 15(a)(2).

18 Defendants did not consent to the amendment; therefore, Plaintiff must obtain leave of  
 19 court to file his proposed amended pleading. Preliminarily, the court notes that Plaintiff's  
 20 motion is untimely. The March 2, 2011 Scheduling Order required any motion for leave to  
 21 amend to be filed within sixty (60) days. (Doc. # 20.) Plaintiff filed his motion more than four  
 22 months after the deadline to seek leave to amend, was filed on September 6, 2011. (Doc. # 36.)  
 23 In addition, Plaintiff allowed the discovery completion deadline pass without requesting an  
 24 extension or moving to amend his complaint. Moreover, he waited eighty-five (85) days after  
 25 Defendants filed their motion for summary judgment to seek leave to amend. Therefore, to be  
 26 able to proceed with his Proposed Second Amended Complaint, Plaintiff must first demonstrate  
 27 good cause for failing to file the motion for leave to amend within the period of time set forth  
 28

1 in the Scheduling Order. (See Doc. # 20.) Second, he must establish justice requires leave to  
 2 amend be granted under Rule 15(a).

3           **A. Good Cause Exists for Plaintiff to Exceed the Scheduling Order Deadline**  
 4           **Governing Leave to Amend**

5 Plaintiff explains that his motion was untimely because he was forced to compel further  
 6 discovery responses from Defendants and review of his medical records, which led him to  
 7 information that supports his proposed amendment. (Pl.'s Reply (Doc. # 40).) He also claims  
 8 that he discovered additional information by way of the exhibits submitted in support of  
 9 Defendants' Motion for Summary Judgment, leading him to determine the correct defendants  
 10 to be named and to whom he should direct his allegations. (*Id.*)

11 Defendants' Motion for Summary Judgment was filed on June 7, 2011. (Doc. # 23.) On  
 12 July 20, 2011, the court ordered further responses to discovery, afforded Plaintiff an opportunity  
 13 to review his medical records, and gave him an additional forty-five (45) days to oppose the  
 14 Motion for Summary Judgment. (Doc. # 34.) Plaintiff filed his motion to amend on September  
 15 6, 2011. (Doc. # 36.) It is reasonable to believe that Plaintiff discovered additional information  
 16 leading him to identify the "correct" defendants and specifically tailor his allegations during  
 17 the time period he was allotted to review his medical records and respond to Defendants' Motion  
 18 for Summary Judgment. The court appreciates Plaintiff's desire to direct his allegations to the  
 19 proper defendants, and a review of his proposed amendment reveals that appears to be his  
 20 intent. Since Plaintiff presumably discovered this information some time between the July 20,  
 21 2011 hearing on his Motion to Compel, and the time he filed the instant motion, September 6,  
 22 2011, the court does not find Plaintiff was dilatory in seeking leave to amend. Accordingly, the  
 23 court finds there is good cause to exceed the deadline for amendments set forth in the  
 24 Scheduling Order, and other court-established deadlines.

25           **B. The Interests of Justice Require Leave to Amend Be Granted**

26 Now, the court must address whether the interests of justice require granting leave to  
 27 amend. *See Fed.R.Civ.P. 15(a)(2).* While the court should freely give leave to amend when justice  
 28

1 requires, leave need not be granted where amendment: "(1) prejudices the opposing party; (2)  
 2 is sought in bad faith; (3) produces an undue delay in litigation; or (4) is futile." *Amerisource*  
 3 *Bergen Corp. v. Dialysis West, Inc.*, 465 F.3d 946, 951 (9th Cir. 2006) (citation omitted). The  
 4 court will review these factors with respect to Plaintiff's motion.

5 **1. The Proposed Second Amended Complaint**

6 **a. Factual Allegations**

7 The Proposed Second Amended Complaint names Defendants NDOC<sup>2</sup>, Karen Gedney,  
 8 Nurse Jane Doe, Howard Skolnik, Bruce Bannister, James Benedetti, Donald Helling, James  
 9 Cox, E.K. McDaniel, and Debra Brooks. (Doc. # 36-1 at 1-5.)

10 The allegations of the Proposed Second Amended Complaint are summarized as follows:

11 On May 14, 2005, while housed at ESP, Plaintiff suffered serious heart complications  
 12 resulting in an emergency life flight to Valley Hospital in Las Vegas. (Doc. # 36-1 at 6.) He was  
 13 subsequently transported to HDSP, in Indian Springs, Nevada, on May 17, 2005. (*Id.* at 6-7.)  
 14 He was transported back to ESP on June 21, 2005. (*Id.* at 7.) In December 2005, Plaintiff was  
 15 sent to the ESP infirmary for heart complications. (*Id.*) In April 2006, Plaintiff was transported  
 16 to a hospital for treatment for heart complications. (*Id.*) On April 19, 2006, ESP Nurse Boja  
 17 Lemich referred Plaintiff for admission to the Cardio Clinic at NNCC for his heart condition.  
 18 (*Id.*) In August 2006, Plaintiff was transferred from ESP to NNCC, and was housed in the NNCC  
 19 Regional Medical Facility (RMF) to monitor his heart condition. (*Id.*) On September 6, 2006,  
 20 Dr. Karen Gedney, at NNCC, entered a health narrative that Plaintiff was to be kept at NNCC  
 21 as a result of his heart condition, and on September 7, 2006, said that Plaintiff should stay  
 22 "north" because he was too unstable to be housed at ESP. (*Id.* at 7-8.)

23

24

25

---

26       <sup>2</sup> Plaintiff names NDOC despite the fact that it was previously dismissed with prejudice. (See Doc.  
 27 # 5 at 4.) In addition, he adds Defendants Karen Gedney, Nurse Jane Doe, Bruce Bannister, Donald Helling, and  
 James Cox. (Doc. # 36-1 at 1-5.) He appears to dismiss Defendants Baca, Gibson, and Noel. (*Id.*)

28

1 On November 11, 2006, Plaintiff was discharged from NNCC RMF and sent to NNCC  
2 administrative segregation to be monitored. (Doc. # 36-1 at 8.) On February 15, 2007, Plaintiff  
3 was transferred from NNCC to NSP. (*Id.*) On February 23, 2007, Plaintiff was seen by  
4 Dr. Snyder, who like Dr. Gedney did previously, entered a health narrative that Plaintiff was  
5 to be kept in Carson City as a result of his heart problems. (*Id.*)

6 Plaintiff was subsequently transferred back to NNCC, where his heart condition was  
7 monitored. (Doc. # 36-1 at 8.) In June 2007, Plaintiff alleges that Dr. Gedney deleted  
8 Dr. Snyder's health narrative that he should be kept in Carson City. (*Id.* at 8-9.)

9 In June 2009, while housed at NNCC, Plaintiff was charged and found guilty of a  
10 disciplinary infraction, and while he maintains his innocence, he was sentenced to eighteen (18)  
11 months disciplinary segregation. (Doc. # 36-1 at 9.) The NNCC classification committee  
12 recommended to the NDOC Offender Management Division (OMD) that Plaintiff be transferred  
13 to ESP to serve his disciplinary segregation, which was approved by OMD on September 15,  
14 2009. (*Id.*) Plaintiff asserts he also had to be cleared by medical prior to transfer, and NDOC  
15 medical policy required clearance by a nurse, and not a qualified medical doctor. (*Id.* at 9-10.)  
16 He asserts that this policy was promulgated by Defendants Skolnik, Bannister, Helling, Cox,  
17 and Benedetti. (*Id.* at 10.)

18 Plaintiff alleges that the medical clearance transfer report was prepared and signed by  
19 NNCC Nurse Jane Doe on September 25, 2009, who knew from Plaintiff's medical records that  
20 he was not to be transferred to ESP because of his heart condition. (Doc. # 36-1 at 10.) Plaintiff  
21 was transferred to ESP on September 29, 2009. (*Id.*) Plaintiff maintains that he notified ESP  
22 officials, including Defendants McDaniel and Brooks, of his medical need and the fact that he  
23 should not be housed at ESP; to no avail. (*Id.*)

24 On November 15, 2009, Plaintiff began experiencing serious heart complications and  
25 was emergency life flighted to Carson Tahoe Hospital in Carson City. (Doc. # 36-1 at 11.)  
26 Following treatment and release, he was transported back to NNCC for monitoring. (*Id.*)

1 Dr. Johns issued an order that Plaintiff was to be kept in Carson City due to his heart condition.  
 2 (*Id.*)

3 In March 2010, Plaintiff was transferred from NNCC to HDSP, which was in proximity  
 4 to major hospitals in Las Vegas. (Doc. # 36-1 at 11.) He continued to receive monitoring and  
 5 treatment for his heart condition at HDSP. (*Id.*) In October 2010, Plaintiff was transferred to  
 6 Southern Desert Correctional Center (SDCC), in proximity to major Las Vegas hospitals, where  
 7 his heart condition continues to be treated and monitored. (Doc. # 36-1 at 11-12.) He does not  
 8 appear to allege the transfer to HDSP or SDCC violated his rights.

9 **b. Legal Allegations**

10 In Count I, Plaintiff asserts that Defendant Gedney violated his rights under the Eighth  
 11 Amendment of the United States Constitution, Article 1, § 6 of the Nevada Constitution<sup>3</sup>, Nev.  
 12 Rev. Stat. (NRS) 209.371<sup>4</sup>, NRS 212.020<sup>5</sup>, and NRS 197.200<sup>6</sup>, when she deliberately deleted  
 13 restrictions precluding Plaintiff's transfer to ESP from his medical records. (Doc. # 36-1 at 13-  
 14 14.)

15 In Count II, Plaintiff asserts that Nurse Jane Doe violated his rights under the Eighth  
 16 Amendment of the United States Constitution, Article 1, § 6 of the Nevada Constitution,

---

17 <sup>3</sup> Art. 1, § 6 of the Nevada Constitution contains the corollary provision to the Eighth Amendment  
 18 of the United States Constitution, prohibiting cruel and unusual punishment.

19 <sup>4</sup> Nev. Rev. Stat. 209.371 provides: "Corporal punishment and inhumane treatment of offenders  
 20 are prohibited."

21 <sup>5</sup> Nev. Rev. Stat. 212.020, Inhumanity to prisoners, provides: "1. A jailer or person who is guilty  
 22 of willful inhumanity or oppression to any prisoner under care or custody of the jailer or person shall be punished:  
 23 (a) Where the prisoner suffers substantial bodily harm from the inhumanity or oppression, for a category D felony  
 24 as provided in NRS 193.130. (b) Where no substantial bodily harm results, for a gross misdemeanor. 2. Whether  
 25 or not the prisoner suffers substantial bodily harm, any public officer guilty of willful inhumanity is guilty of a  
 26 malfeasance in office."

27 <sup>6</sup> Nev. Rev. Stat. 197.200, Oppression under color of office, provides: "1. An officer, or a person  
 28 pretending to be an officer, who unlawfully and maliciously, under pretense of color of official authority: (a)  
 Arrests or detains a person against the person's will; (b) seizes or levies upon another's property; (c) Dispossesses  
 another of any lands of tenements; or (d) Does any act whereby the person, property or rights of another person  
 are injured, commits oppression. 2. An officer or person committing oppression shall be punished: (a) Where  
 physical force or the immediate threat of physical force is used, for a category D felony as provided in NRS 193.130.  
 (b) Where no physical force or immediate threat of physical force is used, for a gross misdemeanor."

1 NRS 209.371, NRS 212.020, and NRS 197.200, when she cleared Plaintiff for transfer to ESP  
 2 with knowledge that his medical records precluded his transfer. (Doc. # 36-1 at 15-16.)

3 In Count III, Plaintiff alleges that Defendants Skolnik, Bannister, Helling, Cox, and  
 4 Benedetti violated his rights under the Eighth Amendment of the United States Constitution,  
 5 Article 1, § 6 of the Nevada Constitution, NRS 209.371, NRS 212.020, and NRS 197.200, by  
 6 promulgating, permitting, or maintaining a policy, practice or custom of allowing or requiring  
 7 a nurse rather than a qualified medical doctor to conduct medical clearance for Plaintiff for  
 8 purposes of institutional transfers. (Doc. # 36-1 at 17-18.) In addition, he asserts that this policy  
 9 resulted in Plaintiff being transferred back to ESP, where he suffered serious heart  
 10 complications and was emergency life lifted to a hospital in Carson City. (*Id.*)

11 In Count IV, Plaintiff alleges that Defendants McDaniel and Brooks violated his rights  
 12 under the Eighth Amendment of the United States Constitution, Article 1, § 6 of the Nevada  
 13 Constitution, NRS 209.371, NRS 212.020, and NRS 197.200, when they deliberately failed to  
 14 take reasonable steps to expedite his transfer from ESP, while fully aware that Plaintiff should  
 15 not have been housed at ESP because of his heart condition. (Doc. # 36-1 at 19-20.)

16 Plaintiff requests compensatory, punitive, declaratory and injunctive relief. (Doc. # 36-1  
 17 at 23-24.)

## 18           **2. Analysis**

### 19           **i. Whether the filing of a Second Amended Complaint will 20 Prejudice Defendants**

21 Defendants do not argue that Plaintiff seeks leave to amend in bad faith. Rather, they  
 22 argue that they would be prejudiced if leave to amend is granted, and that granting leave to  
 23 amend would result in an undue delay in litigation. Specifically, they assert that significant time  
 24 has been spent preparing Defendants' dispositive motion, and they have invested a substantial  
 25 amount of time in investigating and defending against Plaintiff's initial theory of the case.  
 26 (Defs.' Opp. (Doc. # 38).)

1       While the court appreciates and specifically recognizes that Defendants have been  
2 diligent in this matter and have spent a substantial amount of time on their defense, the overall  
3 theory of the case does not vary significantly from the original Complaint to the Proposed  
4 Second Amended Complaint. The crux of Plaintiff's allegations remains consistent in the original  
5 Complaint and the Proposed Second Amended Complaint: Defendants were deliberately  
6 indifferent to his serious medical need in violation of the Eighth Amendment when they  
7 transferred him to ESP despite knowledge of his heart condition and direct orders that he should  
8 not be transferred from Carson City. (*See Doc. # 6 and Doc. # 36-1.*) While Plaintiff now asserts  
9 a violation of the Nevada Constitution and various provisions of the Nevada Revised Statutes,  
10 which are new legal theories of recovery (addressed further below), his overall theory supporting  
11 these claims remains the same. Therefore, the effort spent investigating and defending against  
12 Plaintiff's original Complaint is not in vain, and much of the investigation and research required  
13 to defend against the Proposed Second Amended Complaint has already been done. In fact,  
14 the Proposed Second Amended Complaint should make it less burdensome for Defendants to  
15 proceed with their defense because it contains more detailed factual allegations than the original  
16 Complaint, and is narrowly tailored to the appropriate defendants. While the court appreciates  
17 that Defendants will undoubtedly be inconvenienced by an amendment, it finds Defendants  
18 will not be unduly prejudiced.

19       The court also finds that granting leave to amend will not result in an undue delay in the  
20 litigation. This allegations of the Proposed Second Amended Complaint center around Plaintiff's  
21 medical records, and to a lesser extent, the grievances and responses concerning these facts.  
22 For that reason, most, if not all, of the discovery in this action should be complete or nearing  
23 completion. Defendants certainly have been in possession of these critical documents for some  
24 time now. Moreover, Defendants will have already done much of the legwork to prepare a  
25 motion for summary judgment. In sum, the court finds the interests of justice require that  
26 Plaintiff's Motion for Leave to Amend (Doc. # 36) be granted, and the Clerk should be directed  
27 to file the Second Amended Complaint.

**ii. Screening of the Proposed Second Amended Complaint**

To streamline this matter, the court has concurrently screened the Second Amended Complaint pursuant to 28 U.S.C. § 1915(e)(2). Plaintiff was previously advised NDOC is not a proper party to this lawsuit, and was previously dismissed with prejudice. Accordingly, NDOC should be dismissed from the Second Amended Complaint, with prejudice. See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 69 (1997); *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71 (1989); *Doe v. Lawrence Livermore Nat’l Lab.*, 131 F.3d 836, 839 (9th Cir. 1997); see also *Black v. Nevada Dept. of Corrections*, 2010 WL 2545760, at \*2 (Slip Copy, D. Nev., June 21, 2010).

10 The court finds that Plaintiff states a colorable claim under the Eighth Amendment to  
11 the United States Constitution, and under Article 1, § 6 of the Nevada Constitution against  
12 Defendants Karen Gedney, Howard Skolnik, Bruce Bannister, James Benedetti, Donald Helling,  
13 James Cox, E.K. McDaniel, and Debra Brooks.

14 Plaintiff also names Defendant “Nurse Jane Doe.” There is no provision in the Federal  
15 Rules of Civil Procedure permitting the use of fictitious defendants. *See Fifty Associates v.*  
16 *Prudential Ins. Co.*, 446 F.2d 1187, 1191 (9th Cir. 1970); *McMillan v. Dep’t of the Interior*, 907  
17 F.Supp. 322 (D. Nev. 1995). If there are unknown persons, whose role is known, that fact  
18 should be expressed in the pleading, but it is unnecessary to include “Doe” parties in the  
19 pleadings. This does not preclude a party’s right, upon learning the identity of the unknown  
20 party, to seek leave to amend and have the court determine whether the amendment relates back  
21 in time to the original filing, if circumstances permit. Accordingly, Defendant “Nurse Jane Doe”  
22 should be dismissed. If and when Plaintiff discovers her true identity, he may seek leave to  
23 amend, and the court will determine at that time whether leave should be permitted. It should  
24 be noted that Nevada law governs the statute of limitations in § 1983 actions, and rules  
25 governing relation back. *See, e.g., Merritt v. County of Los Angeles*, 875 F.2d 765, 768 (9th  
26 Cir. 1989). In the event a plaintiff seeks to add a defendant whose identity was previously  
27 unknown, the plaintiff must, among other things, establish reasonable diligence in ascertaining

1 the true identity of the intended defendants and that the plaintiff promptly moved to amend.  
2 See Nevada Rule of Civil Procedure 10(a); *Nurenberger Hercules-Werke GMBH v. Virostek*,  
3 822 P.2d 1100, 107 Nev. 873 (Nev. 1991).

4 Plaintiff's allegations under NRS 209.371, NRS 212.020, and NRS 197.200 seek to hold  
5 Defendants criminally liable for their alleged conduct. Courts have long held that, unless an  
6 exception exists, "criminal statutes cannot be enforced by civil actions." *Collins v. Palczewski*,  
7 841 F.Supp. 333, 340 (D.Nev. 1993) (quoting *Bass Angler Sportsman Soc. v. United Steel*  
8 *Corp.*, 324 F.Supp. 412, 415 (S.D. Ala. 1981) (citation omitted); *United States v. Jourden*, 193  
9 F. 986 (9th Cir. 1912)). Accordingly, Plaintiff's state law claims brought under NRS 209.371,  
10 NRS 212.020, and NRS 197.200, should be dismissed with prejudice.

11 As a result of the foregoing recommendations, Defendants' pending Motion for  
12 Summary Judgment (Doc. # 23) does not address the operative complaint. Therefore,  
13 Defendants' Motion for Leave to File Confidential Documents in Support of Defendants' Motion  
14 for Summary Judgment (Doc. # 22) and Defendants' Motion for Summary Judgment  
15 (Doc. # 23) should be denied as moot. Plaintiff has also filed a Motion to Stay the Summary  
16 Judgment Proceedings while his motion for leave to amend is pending (Doc. # 39), which should  
17 be denied as moot. Finally, the Scheduling Order (Doc. # 20) should be vacated.

18 **III. RECOMMENDATION**

19 **IT IS HEREBY RECOMMENDED** that:

20 (1) Plaintiff's Motion for Leave to File Second Amended Complaint (Doc. # 36) be  
21 **GRANTED**, and the Clerk be directed to file the Second Amended Complaint;  
22 (2) NDOC be **DISMISSED** from the Second Amended Complaint, **with prejudice**;  
23 (3) Defendant Jane Doe be **DISMISSED** from the Second Amended Complaint,  
24 **without prejudice**;  
25 (4) Plaintiffs state law claims brought under NRS 209.371, NRS 212.020, and NRS  
26 197.200 be **DISMISSED** from the Second Amended Complaint, **with prejudice**;

1                     (5) Defendants' Motion for Leave to File Confidential Documents in Support of  
2 Defendants' Motion for Summary Judgment (Doc. # 22), and Defendants' Motion for Summary  
3 Judgment (Doc. # 23) be **DENIED AS MOOT**;

4                     (6) Plaintiff's Motion to Stay Summary Judgment Proceedings (Doc. # 39) be **DENIED AS MOOT**;

5                     (7) The Scheduling Order (Doc. # 20) be **VACATED**;

6                     (8) The Clerk electronically serve a copy of this order, along with a copy of the Second  
7 Amended Complaint, on the Office of the Attorney General of the State of Nevada, attention  
8 Pamela Sharp, when an order is entered by the District Judge adopting this Report and  
9 Recommendation. The Attorney General shall advise the court within twenty-one (21) days of  
10 the date of entry of the District Judge's order adopting this Report and Recommendation  
11 whether they can accept service of process for the named Defendants and the last known address  
12 under seal of the Defendants for which they cannot accept service. If the Attorney General  
13 accepts service of process for any named Defendant(s), such Defendant(s) shall file and serve  
14 an answer or other response to the complaint within thirty (30) days of the date of the notice  
15 of acceptance of service; and

16                     (9) Henceforth, Plaintiff shall serve upon Defendants, or, if an appearance has been made  
17 by counsel, upon their attorney(s), a copy of every pleading, motion, or other document  
18 submitted for consideration by the court. Plaintiff shall include with the original paper  
19 submitted for filing a certificate stating the date that a true and correct copy of the document  
20 was mailed to the Defendants or counsel for Defendants. If counsel has entered a notice of  
21 appearance, at the address stated therein. The court may disregard any paper received by a  
22 district judge or a magistrate judge that has not been filed with the Clerk, and any paper which  
23 fails to include a certificate showing proper service.

24                     The parties should be aware of the following:

25                     1.       That they may file, pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the  
26 Local Rules of Practice, specific written objections to this Report and Recommendation within  
27

1 fourteen (14) days of receipt. These objections should be titled “Objections to Magistrate Judge’s  
2 Report and Recommendation” and should be accompanied by points and authorities for  
3 consideration by the District Court.

4       2. That this Report and Recommendation is not an appealable order and that any  
5 notice of appeal pursuant to Rule 4(a)(1), Fed. R. App. P., should not be filed until entry of the  
6 District Court's judgment.

DATED: October 5, 2011

William M. Colby

UNITED STATES MAGISTRATE JUDGE